VIRGINIA LAW REGISTER

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All Communications should be addressed to the PUBLISHERS.

The newspapers are full now of the announcements of candidates for the next Legislature. There is also some discussion as to the aid the University of Virginia might give to our General Assembly and a slight reference was made in one or more papers as to the influence of the University of Wisconsin upon the well-being of that State, as well as the aid it affords to the Legislative Assembly. The newspapers are mistaken, however, in the statement that there is a committee of the faculty of the University of Wisconsin to whom is referred all of the proposed legislation changing the laws of that State. There is at the capitol of Wisconsin a legislative reference department of which Dr. Charles McCarthy is the head and which department gives the individual members of the Legislature and the committees all the assistance possible in the drafting of bills. The University professors cooperate with this department and give advice and assistance concerning any subject on which they have special knowledge whenever asked. In other words this department does for the Legislature of Wisconsin what a highly-salaried official of the House of Commons does for the Parliament in England. The value of such a department is apparent and in no way do we think our University could perform a greater service than by assisting in the work of such department.

Legislation and University Aid.

In addition to a general supervision of changes in the law, this department should have the privilege of suggesting changes in the law itself, so as to render our statute law consistent, intelligible and of general application—in other words, to prevent the many amendments to our Code which are passed by our General Assembly at the instance of some Legislator who has a grievance

against some statute affecting a constituent and has the law changed to fit that one case. The result is that one hard case makes many very bad laws. In addition to other good reasons for the formation of such a committee the limited time allowed by our Constitution for our Legislative sessions does not permit careful scrutiny of many of the most important measures proposed. As a general rule also each new General Assembly is composed of a majority of new and untried men who may be of unusual intelligence, but are certainly not well versed in the intricate business of framing laws. To have, therefore, a department of men learned in the law, associated with others trained in the study of civics, to inspect new legislation and advise upon its effect and wisdom, would be of incalculable value. Those composing such a department would have no axe to grind, no constituents to face and would be actuated by no other motives than those of the highest character. Their training, their habits of thought, their independence from the influence of the proletariat would render their advice and suggestion worthy of careful consideration and lead to the passage of laws which would benefit the whole body politic.

A Big Day in the Supreme Court of the United States.

Seldom in its history has the Supreme Court of the United States in any one day handed down as many decisions of as far reaching importance as on June 9th. The railroad rate decision from the State of Minnesota sustained the right of the States to fix intrastate rates on interstate railroads, even when this control indirectly affected interstate commerce. Porter Charlton, who murdered his wife in Italy three years ago, was ordered to be extradited, despite the fact that Italy refuses to surrender her citizens who have committed crimes in this country. The Newspaper Publicity Law was unanimously held to be constitutional. Street car lines were held not to be subject to the regulation of the Interstate Commerce Commission, Mr. Justice Lurton, delivering the opinion of the court, deciding that Congress, in using the word "railroad" in the Interstate Commerce Law, had not done so in the sense of a local line such as a street railway essentially

was. It is a rather curious fact that twelve states have ruled that the word "railroad" included a street railway, and twelve have held just the opposite. It was also decided by the Supreme Court on the same day that the city of Denver had the right to tax the Singer Sewing Machine in that city upon money collected from sales in adjoining states.

The railroad rate case is rendered of unusual importance in view of the fact that there are thirty odd other cases now pending in the Supreme Court which it is thought this decision will settle. The court was unanimous in holding that until Congress attempted to regulate this subject, as it had done in the matter of Employers' Liability, the States had a perfect right to regulate rates as long as such rates were not confiscatory. The Minnesota two-cent law and the orders of the Minnesota Railroad and Warehouse Commission fixing maximum rates within the State were assailed by the Northern Pacific Railway Company, the Great Northern Railway Company, and the Minnesota & St. Louis Railroad. The roads offered three reasons for setting aside the rates resulting from the statute and the orders of the State commission: That they involved an unconstitutional attempt by a State indirectly to affect interstate rates; that they involved a direct burden upon interstate commerce; and that they were confiscatory.

In regard to all three roads, each of which presented its case separately in the lower court, the Supreme Court threw out the first two reasons. It held that the indirect effects of an act of legislation which the State is perfectly competent to perform cannot constitute an undue burden on interstate commerce. The constitutional objection was disposed of on the ground that the mere failure of Congress to interpose did not leave the situation in the hands of individual railroads to regulate to suit themselves.

One of the most interesting features of the exhaustive decision is its treatment of the alleged confiscation. The question of the real or the physical valuation of roads, which the Interstate Commerce Commission has just undertaken, is certain to reach the Supreme Court in various forms not long after the Commission completes its work.

Today, however, as if in anticipation of the work of the Interstate Commerce Commission, the Supreme Court discussed the

subject of valuation in great detail. The belief is expressed in certain quarters that the court's rejection of the system of valuation adopted by the court below on the suggestion of the railroad strikes a heavier blow at railroads than the upholding of the state law.

Justice Hughes in his decision utterly disregarded the claims of the roads for a peculiarly high valuation of their property on the ground of the peculiarly important uses to which it was put, or on the ground of the high returns yielded by railroad property. That would be to decide a question of fair rates, says the decision, by a simple recitation of what rates are and what they yield. Nor does the unusual length of a right of way enter into consideration as giving a peculiar value to the roadbed. The fair market value of the property and not the "railroad value" must be the criterion.

We publish elsewhere—it being too long for our editorial columns—a brief history of these cases which present the unusual feature of having caused a meeting of the governors of many of the States to devise means to have the rights of the States in the matter upheld.

The Federal Employers' Liability Act—A Note of Warning.

From several cases which have gone up to the Supreme Court of the United States from the State courts it is apparent that the profession—or at least some members thereof—have not "caught on" to many of the finer points of the Act. Four cases were decided on May 26th, 1913, in which this Act was construed, and three of them were reversed. In one case, St. L. I. M. & S. Rwy. *v.* Hesterly's Admr., the Supreme Court of Arkansas was reversed on the ground that the court held that the action which was for the death of an employee on a railroad engaged in Interstate Commerce, was not based upon the Federal Act and that this act was only supplementary and that a judgment for the plaintiff could be upheld under the State law. The Supreme Court of the United States holds that the act of Congress supersedes State laws in the matter with which it deals. Mondou *v.* New York. New Haven & Hartford R. R. Co., 223

U. S. 1, 53-55; Missouri, Kansas & Texas Ry. Co. *v.* Wulf, 226 U. S. 570, 576; Michigan Central R. R. Co. *v.* Vreeland, 227 U. S. 59, 67. The act deals with the liability of carriers, while engaged in commerce between the states, for defects in cars. Section 1. In the case of death the only action is one for the benefit of the next of kin. Section 1. Michigan Central R. R. Co. *v.* Vreeland, 227 U. S. 59, 67, 68; American R. R. Co. *v.* Didricksen, 227 U. S. 145, 149; Gulf, Colorado & Sante Fe Ry. Co. *v.* McGinnis, 228 U. S. 173, 175. Therefore the ruling of the state court was wrong.

In another case St. L. San. F. & L. Rwy. *v.* Seale the action was by the widow and parents of an employee killed whilst in the employment of the defendant railway company by the negligence of another employee.

Two courts—subordinate and appellate—decided that the action was properly brought under the laws of Texas by the widow and next of kin, though the Federal Statute confined the right of recovery to the personal representative; and that the plaintiff's intestate being killed in the North Sherman yards, the terminal of the road where trains were made up, and there being no evidence to show that any of the cars in the train which killed the employer were destined for other points, the State Statute only prevailed. The Supreme Court reversed the Texas courts, holding that the train which killed the plaintiff's intestate came from Oklahoma and was an interstate train and did not lose that character by arriving at a terminal and that only the personal representative could sue.

The third case was that of an iron worker employed by the D. Lack. & W. R. R. Co. in the alteration and repair of its bridges and track near Hoboken, N. J. He was on his way to a bridge in New Jersey carrying a sack of bolts and rivets and was run down and injured by the negligence of the engineer on an *intrastate* passenger train. The lower (U. S.) court held that an injury resulting from the negligence of a co-employee engaged in intrastate commerce was not within the terms of the Federal Act, and the Circuit Court of Appeals, although disapproving that ruling, held that under the evidence it could not be said that the plaintiff was engaged in interstate commerce and was

not entitled to recover. But the Supreme Court reversed the Circuit Court of Appeals and held that the true test in such cases is: Is the work in question a part of the interstate commerce in which the carrier is engaged? See McCall *v.* California, 136 U. S. 104, 109, 111; Second Employer's Liability Cases, supra, 6, 59; Zikos *v.* Oregon R. & Navigation Co., 179 Fed. 893, 897, 898; Central R. Co. of N. J. *v.* Colasurdo, 192 Fed. 901; Darr *v.* Baltimore & O. R. Co., 197 Fed. 665; Northern Pacific Ry. Co. *v.* Maerki, 198 Fed. 1. And that keeping a bridge in repair is so closely related to interstate commerce as to be in practice and in legal contemplation a part of it. This case goes a bow shot beyond anything we have yet seen on this subject and in our humble judgment Mr. Justice Lamar (who dissented, Holmes and Lurton, JJ., uniting in the dissent) states the right rule, which unfortunately is not now the law. He says:

"The act was not intended to include manufacturing, building, repairing, for they are not commerce, whether performed by a private person, a railroad or its agents.

"It is conceded that a line must be drawn between those employees of the carrier who are employed in commerce and those engaged in other departments of its business. It must be drawn so as to take in on one side those engaged in transportation, which is commerce, otherwise there is no logical reason why it should not include every agent of the company; for there is no other test by which to determine when he must sue under the State statute and when under the act of Congress; for if a man on his way to repair a bridge is engaged in interstate commerce, then the man in the shop who made the blots to be used in repairing the bridge is likewise so engaged. If they are, then the man who paid them their wages, and the bookkeeper who entered those payments in the accounts, are similarly engaged. For they are all employed by the carrier, and the work of each contributes to its success in hauling freight and passengers.

"This view is supported by two cognate statutes. The Hours of Service Law applies only to those 'engaged in the movement of trains' and the Safety Appliance Law refers, not to machines in the shop, but to cars and locomotives, which are the immediate instruments of transportation. The Employers' Liability Act in like manner applies to those engaged in transportation and not to those employed in building, manufacturing or repairing.

"The plaintiff was carrying bolts to be used in repairing

a bridge. That was not Interstate Commerce, and in my opinion the court below properly held that his rights were to be determined by the laws of the State of New Jersey and not by the Act of Congress."

The fourth case, N. & W. Railway Company *v.* Earnest, came from our own Western District and Judge McDowell was sustained by the Supreme Court. The defendant claimed that the Employers' Liability Act was repugnant to the Constitution of the United States. After the writ of error was allowed his point was effectually disposed of in Second Employers' Liability Cases, 223 U. S. 1. An instruction was given in which the court said that if the plaintiff was guilty of contributory negligence, such negligence "goes by way of diminution of damages" instead of saying the jury "must diminish" the damages, and that the jury might diminish the damages upon a comparison of the plaintiff's negligence with that of the defendant. Defendant did not object in the trial court to the giving of this instruction upon any other ground except that the Employers' Liability Act was unconstitutional, though it raised objections to it in the Circuit Court of Appeals. The Supreme Court criticizes the verbiage of the instruction and is evidently of the opinion that the use of the words "as compared with the negligence of the defendant" did not express the true intent of the statute, saying those words were not happily chosen, for to have reflected what the statute contemplates they should have read,

"as compared with the combined negligence of himself and the defendant." We say this because the statutory direction that the diminution shall be "in proportion to the amount of negligence attributable to such employee" means, and can only mean, that, where the casual negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; the purpose being to abrogate the common law rule completely exonerating the carrier from liability in such a case and to substitute a new rule confining the exoneration to a proportional part of the damages corresponding to the amount of negligence attributable to the employee. Second Employers' Liability Cases, 223 U. S. 1, 50.

The court, however, refused to reverse the case because this instruction was given, but applies the rule that where an instruction embodies several propositions of law, to some of which no objection properly could be taken, a general exception to the entire instruction will not entitle the exceptor to take advantage of a mistake or error in some single or minor proposition therein. Baltimore & Potomac Railroad Co. *v.* Mackey, 157 U. S. 72, 86; McDermott *v.* Severe, supra. A most excellent rule which we commend to our state courts.

Eminent Domain— Elements of Value.

That great minds will differ is a well known adage. How, therefore, can we expect great courts always to agree? So when we find two such tribunals as the Supreme Court of Appeals of Virginia and the Supreme Court of the United States differing upon an important question we try to examine with great care, to find if haply we can, which opinion suits us best. In the present instance we decide without the slightest hesitation in favor of our own tribunal, not only because we have had reasons for preferring that view, but because in our judgment it is the right view to take. Our own court in the case of Burger *v.* State Female Normal School, decided March 13th, 1913, holds that in ascertaining the value of property sought to be condemned the Commissioners should consider the uses of the land for all purposes including the use for which it is sought to be condemned; but the object is not to ascertain the value for that purpose alone, but to ascertain the fair market value of the property, so that just compensation may be made and a full and perfect equivalent given for the property taken. The attention of the Commissioners should not therefore be *unduly directed* to the necessities of the condemner and thus dispose them to regard that as the *chief element* for their consideration.

It is hard to imagine a rule of greater fairness than this, especially in view of the harsh nature of condemnation proceedings. A man should not only have a fair price for his land, but a price as near as possible to what he would receive in case the

purchaser was a private individual.. A man always fixes a price on his property in view of the needs of the purchaser, when they can be ascertained. He has a right to do so. Should the strong arm of the State take property, by virtue of this *vis superior*, without any regard to a value necessarily entering into the transaction and perfectly apparent? Of course, as our Court well says, it should not be regarded as the chief element, nor the attention of the Commissioners *unduly directed* to the necessities of the condemnor, but it is certainly an element and a strong one to be considered in fixing the value of the property to be condemned.

But the Supreme Court of the United States in the case of U. S. *v.* Chandler, Dunbar, etc., decided May 26th, 1913, and later in the case of McGovern *v.* City of New York, holds that the necessities of the buyer have nothing to do with the case, and that the right of eminent domain precludes the sellor of property sought to be condemned from urging such necessities of the buyer or from urging the additional value that might result from the use under consideration.

In the first case named the court says: "But in a condemnation proceedings the value of the property to the government for its particular use is not a criterion. The owner must be compensated for what is taken from him, but that is done when he is paid the fair market value *for all available purposes*" (italics ours.) But just there is the rub: If the "fair market value for all available purposes" is to be considered, then surely the use to which the Government wishes to put it is one of those "available purposes," and as Mr. Justice Holmes would say, by the rules of "ineluctable logic" ought to be considered. It is true that Mr. Justice Holmes, in delivering the opinion of the Court in the McGovern case, said that each case of condemnation stands upon its own merits.

Mr. Justice Hughes, in delivering the opinion in the Minnesota rate cases, laid down practically the same rule, approving the doctrine in U. S. *v.* Chandler-Dunbar Co. and what seems rather strange to us, quoting with approval Boom Company *v.* Patterson, 98 U. S. 403, in which it is held that in the case of land sought to be condemned, which had a peculiar value or

special adaptation for railroad purposes, that would be an element to be considered. Shoemaker *v.* U. S., 147 U. S. 282.

The McGovern case was decided after the Minnesota Rate Cases and the rule laid down in those cases was sustained in that case.

The Virginia rule is the fairest, most logical and ought to be a law of universal application.

The Virginia Supreme Court Sustained.

The Supreme Court of the United States, however, we are glad to say, agrees with our Supreme Court of Appeals in two decisions handed down May 12th, 1913. One is upon a petition to rehear the case of Consolidated Turnpike Co. *v.* Norfolk & Ocean View Railroad Company, in which the United States Supreme Court declines to rehear the case. We alluded to the opinion of the United States Supreme Court in this case in a previous number of the LAW REGISTER. The original case was reported in 111 Va. 131.

In the case of the N. & W. R. R. Company *v.* Dixie Tobacco Company, 111 Va. 813, the Supreme Court affirms the ruling of the Supreme Court of Appeals of the State of Virginia. The question raised in the State court, as well as in the United States Supreme Court, was that the act of June 29th, 1906, c. 3591, Section 7, 34 Stat. 584, 595, amending Section 20 of the act to regulate commerce of February 4th, 1887, c. 104, 24 Stat. 379-386, is unconstitutional. This section requires in a common carrier receiving property for transportation from a point in one state to a point in another to issue a receipt or bill of lading for the same; makes the receiving carrier liable for loss caused by any common carrier *in transitu;* and provides that no contract shall exempt it from the liability thus imposed. Our State Supreme Court sustained the constitutionality of the law and its decision is now affirmed by the Supreme Court of the United States.

The Small Compensation Attached to the Judicial Office.

The resignation of Judge Walter C. Noyes of the United States District Court for the second Judicial District calls attention to the fact that if the government wants good servants it ought to be willing to pay for them. Judge Noyes resigned because he found the salary of seven thousand dollars a year inadequate for the support of his family and education of his children. Judge Noyes is forty-seven years old. He has been on the bench for six years as United States Judge, and was formerly Judge of the Court of Common Pleas for New London County, Conn., for twelve years. He is a judge of unusual ability and prominence and the author of the work "Intercorporate Relations." He proposes to take up railroad and corporation law and will no doubt earn in a very short while five times the amount of his salary as judge. It is a strange thing that our lawmakers do not recognize the fact that the best talent deserves the best prices, and that only by paying for brains brain power can be obtained. A favorite term amongst the common people is to speak of "hiring" a lawyer. Evidently our governmental agencies want to "hire" judges at the lowest possible wage, and we have often heard men who ought to know better say, "Why pay judges better prices, when there are a dozen applicants for every vacancy?" We have always asked gentlemen who put this question to us whether in case they wanted a servant in the most confidential class they would select the cheapest they could obtain, regardless of every other consideration, and fix their price at a very low figure because they knew a large number of people would apply. Imagine a man with a wife or child dangerously ill with a fever, allowing a hundred doctors to apply to treat the patient and to select one at random because he fitted the place at the lowest salary; and who would also in advance fix the lowest possible rate and invite doctors to compete for the treatment of his loved ones. We are practically doing this and it is about time that people were waking up to the fact that the "recall" would be seldom needed if the judicial office was properly compensated and only the best men selected for the place.

Our wonder grows every day how Virginia manages to maintain its high standard of judicial ability and integrity in view of the beggarly pittances paid our judges. It must be that about the rags and tatters of the judicial ermine there yet hangs a remnant of the old-time dignity and that in the hearts of those who are willing to serve us there is a sentiment of duty to be performed which has ever been a characteristic of the Virginia lawyer. We would that in some way we could reach alike the hearts and intelligence of our lawmakers and those who select them and convince them of the importance of making the judicial office not only one of dignity but of such compensation as will repay those who are willing to serve the State.